

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

TRANSCRIPT OF PROCEEDINGS

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:
UNITED STATES OF AMERICA, : CRIMINAL ACTION
:
vs. : NO. 5:11-CR-00090-20
:
SHAWN A. ANDERSON, : June 1, 2011
:
Defendant. :
:
-----x

PLEA HEARING

BEFORE THE HONORABLE IRENE C. BERGER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: MR. MILLER A. BUSHONG, III
Assistant U.S. Attorney
110 Heber Street, Room 261
Beckley, WV 25801

For the Defendant: MR. KEVIN D. MILLS
Kevin D. Mills & Associates
1800 West King Street
Martinsburg, WV 25401

Court Reporter: Lisa A. Cook, RPR-RMR-CRR-FCRR

Proceedings recorded by mechanical stenography; transcript
produced by computer.

P R O C E E D I N G S

THE CLERK: The matter before the Court is the *United States vs. Shawn Anderson*, Case Number 5:11-CR-90-20, scheduled for plea hearing.

THE COURT: Good morning.

Counsel, would you note your appearances on the record, please.

MR. BUSHONG: Good morning, Your Honor. Miller Bushong for the United States.

MR. MILLS: Kevin D. Mills, Your Honor, on behalf of the defendant. Good morning.

THE COURT: Are we prepared to go forward in this case, counsel?

MR. BUSHONG: United States is ready, Your Honor.

MR. MILLS: Ready on behalf of the defendant for the entry of a plea, Your Honor.

THE COURT: Madam Clerk, if you would please administer the oath to Mr. Anderson.

(Defendant sworn)

THE COURT: Mr. Mills, it's my understanding that your client desires to enter a plea of guilty to Count Sixteen. Is that correct?

MR. MILLS: Yes, Your Honor.

THE COURT: Mr. Anderson, do you understand that you're now under oath and that if you answer any of my

1 questions falsely, your answers can be used against you
2 later in a subsequent prosecution for perjury or giving of a
3 false statement?

4 THE DEFENDANT: Yes.

5 THE COURT: During the course of this hearing I'll
6 have a number of questions to ask you. If at any time you
7 do not understand something that I say, I want you to ask me
8 to explain it or repeat it. And if at any time you need to
9 confer privately with your attorney, Mr. Mills, let me know
10 and I will accommodate you on that.

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: State your full name, please.

13 THE DEFENDANT: Shawn A. Anderson.

14 THE COURT: And how old are you, Mr. Anderson?

15 THE DEFENDANT: Thirty-seven years old.

16 THE COURT: How much education have you received?

17 THE DEFENDANT: I graduated from the High School
18 of Commerce in Massachusetts and have had maybe three
19 semesters at the College of West Virginia, Ohio State
20 University.

21 THE COURT: Can you read and write?

22 THE DEFENDANT: Yes, I can.

23 THE COURT: Have you recently been under the care
24 of a doctor, psychiatrist, or other medical professional for
25 any serious physical or emotional illness?

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: Are you currently taking any type of
3 medication, controlled substance, or alcohol that might
4 interfere with your ability to understand the proceedings
5 here this morning?

6 THE DEFENDANT: No, Your Honor.

7 THE COURT: Mr. Mills, during the course of the
8 time that you have represented Mr. Anderson, have you had
9 any reason to question his competence?

10 MR. MILLS: No, Your Honor, I have not.

11 THE COURT: I find, Mr. Anderson, that you are
12 competent and capable of entering an informed plea.

13 Do you believe that you've had adequate time to discuss
14 your case with Mr. Mills?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Has he been able to advise you about
17 how to best proceed in this matter?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: And are you completely satisfied, Mr.
20 Anderson, with the legal representation you have received
21 from Mr. Mills?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Mr. Mills, have you had adequate time
24 to discover the Government's case?

25 MR. MILLS: Yes, Your Honor.

1 THE COURT: Have you also had adequate time to
2 give consideration to possible defenses to this claim for
3 your client?

4 MR. MILLS: Yes, Your Honor. We've explored all
5 avenues of the offense that I think are available given the
6 discovery we've had and an opportunity to review it and I'm
7 satisfied that the decision the defendant has made is in his
8 best interest.

9 THE COURT: Have you also had adequate time to
10 give consideration to possible sentences?

11 MR. MILLS: Yes, Your Honor.

12 THE COURT: During the time that you have
13 represented Mr. Anderson, has he been fully cooperative with
14 you?

15 MR. MILLS: He has been fully cooperative and
16 always on time for his appointments at my office and
17 fulfilled all of his obligations when he promised to be
18 someplace.

19 THE COURT: You have, I take it, discussed the
20 discovery, the potential sentences, as well as the potential
21 defenses with your client. Is that also correct?

22 MR. MILLS: That's correct, Your Honor. There's
23 over a couple thousand pages of discovery. So, it involves
24 several days of meetings at my office over a course of a few
25 weeks. And even prior to the arrival of discovery, we were

1 exploring defenses and possible ways to, to handle the case.
2 And I believe that he understood all of his options and we
3 explored each one individually and carefully.

4 THE COURT: I take it from your comment that it is
5 your belief that you have been very thorough with your
6 client in relation to the discovery, the potential
7 sentences, and the potential defenses. Is that correct,
8 counsel?

9 MR. MILLS: Yes, Your Honor.

10 THE COURT: There is a proposed plea agreement in
11 this matter. Is that true?

12 MR. MILLS: There is, Your Honor.

13 THE COURT: You-all can have a seat there for a
14 moment.

15 Mr. Bushong, if you would please summarize the terms of
16 the agreement on the record.

17 MR. BUSHONG: Your Honor, the proposed plea
18 agreement is a seven-page document with one attachment, Plea
19 Agreement Exhibit A, which is the Stipulation of Facts.
20 It's in letter form. It's dated April 25th, 2011. It's
21 addressed to Kevin D. Mills, counsel for the defendant. And
22 I'll summarize each paragraph.

23 Paragraph 1 is the pending charges paragraph. It sets
24 out that the defendant is charged in two counts of a
25 20-count indictment. In Count One he's charged with

1 conspiracy to distribute a thousand kilograms of marijuana
2 for remuneration.

3 In Count Sixteen he's charged with distribution of a
4 quantity of marijuana for remuneration. Count Sixteen,
5 which is the offense of conviction, is in violation of 21,
6 U.S.C., Section 841(a)(1).

7 Paragraph 2 is the resolution of charges paragraph.
8 The United States has agreed not to file an 851 information
9 if applicable in his case. The defendant will plead guilty
10 to Count Sixteen. At sentencing the United States will move
11 the Court to dismiss Count One as to this defendant.

12 Paragraph 3 is the maximum potential penalty. Under
13 the statute, the defendant faces a term of imprisonment of
14 five years; a \$250,000 fine; a three-year term of supervised
15 release; \$100 special assessment; denial of federal benefits
16 for up to five years; and restitution.

17 Paragraph 4 is the special assessment paragraph. It
18 states that the defendant at this time does not have the
19 money to pay the special assessment but agrees to pay it
20 through prison earnings if he is incarcerated.

21 It's my understanding, Your Honor, that the defendant
22 may pay that today or before he is sentenced.

23 THE COURT: All right.

24 MR. BUSHONG: So that the substance of Paragraph 4
25 may be moot.

1 Paragraph 5, payment of monetary penalties, states that
2 the defendant agrees to pay any monetary penalty
3 immediately. The defendant will not object to the District
4 Court imposing a schedule of payments to satisfy any
5 monetary penalty.

6 Paragraph 6 is a standard cooperation paragraph.

7 Paragraph 7 is a standard use immunity paragraph.

8 Paragraph 8 is the limitation on that immunity which
9 allows the United States to use information which is learned
10 independently from the defendant in either charging him with
11 additional crimes or in calculating his guidelines.

12 Paragraph 9 is the Stipulation of Facts and waiver of
13 Federal Rule of Evidence 410 paragraph. It states that
14 there is a proposed Stipulation of Facts in this case that's
15 attached to the plea agreement as Exhibit A. The paragraph
16 goes on to set out that that is not binding on the Court.
17 It's not binding on the probation office. The Court does
18 not have to accept it.

19 The paragraph goes on to set out certain circumstances
20 by which the United States might use that Stipulation of
21 Facts if this case were to somehow end up at trial.

22 Paragraph 10 is waiver of appeal and collateral attack.
23 The defendant, pursuant to this plea agreement, essentially
24 waives his right to appeal unless it is above the statutory
25 maximum. The defendant does reserve the right to

1 collaterally challenge the conviction or sentence based on a
2 claim of ineffective assistance of counsel.

3 Paragraph 11 is a waiver of FOIA and privacy rights.
4 The defendant waives both pursuant to this agreement as it
5 relates to this case.

6 Paragraph 12 is the final disposition paragraph. It
7 states that sentencing is within the sole discretion of the
8 Court.

9 Paragraph 13 is the voiding of agreement paragraph. It
10 states that if either party violates the terms of the
11 agreement, the other party has the right to void the
12 agreement. And if the Court refuses to accept the
13 agreement, it shall be void.

14 Paragraph 14 is the entirety of agreement paragraph.
15 It states that this is the entire agreement between the
16 parties. There are no side agreements or understandings
17 outside the four corners of the document.

18 Page 7 has an acknowledgment paragraph at the bottom.
19 It is also signed and dated, Page 7, by the defendant and
20 his counsel. The last page is also signed by myself. And
21 the parties have signed and dated the Stipulation of Facts.

22 THE COURT: All right. Thank you.

23 Mr. Bushong has stated it as he summarized Paragraph
24 14. Mr. Mills, I will ask you, first of all, if this is an
25 accurate summary of the agreement that's been reached

1 between your client and the Government.

2 MR. MILLS: It is an accurate summary, Your Honor.
3 And with the requisite as to Paragraph 4, Mr. Anderson does
4 intend to pay the special assessment.

5 THE COURT: And is this, in fact, the entirety of
6 the agreement that's been reached between your client and
7 the Government?

8 MR. MILLS: It is the entire agreement.

9 THE COURT: Mr. Anderson, do you understand what
10 this agreement does?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Do you understand what it requires of
13 you?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Do you have any questions at all about
16 the plea agreement?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: Were each of the paragraphs of the
19 agreement discussed with you and explained to you prior to
20 your reaching an agreement with the Government?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: And are those, in fact, your initials
23 on the first six pages of the plea agreement?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: And is that your signature, Mr.

1 Anderson, on the last page of the agreement and on the
2 Stipulation of Facts which has been labeled as Exhibit A?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Do you understand that you have
5 entered into a Stipulation of Facts, Mr. Anderson, that can
6 be used as evidence against you if you were to breach the
7 agreement and proceed to trial?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Do you also understand that you have
10 agreed to waive or give up your right under Rule 410 of the
11 Federal Rules of Evidence to challenge the use of that
12 Stipulation of Facts?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you want me to accept the plea
15 agreement?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: I will defer acceptance of the
18 agreement, Mr. Anderson, until I've had the opportunity to
19 review the pre-sentence investigation report in this case.
20 However, I am going to order that the original of the
21 agreement be filed and made a part of the court record here
22 this morning.

23 Have you received a copy of the indictment that was
24 filed against you?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: And have you had the opportunity to
2 read that indictment?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Would you like for me to read it to
5 you here this morning or will you waive its reading?

6 THE DEFENDANT: I'll waive it, Your Honor.

7 THE COURT: How do you plead, Mr. Anderson, to the
8 charge contained in Count Sixteen of the plea agreement?

9 THE DEFENDANT: Guilty.

10 THE COURT: Before I accept your plea, I want to
11 make sure that there is a sufficient factual basis to
12 support your plea of guilty. I also want to ensure that you
13 understand the nature of the charge and the consequences of
14 pleading guilty. I want to make sure that you understand
15 the constitutional and other legal rights that you will be
16 waiving and giving up by pleading guilty. And I also want
17 to make sure that your plea is voluntary.

18 I'll go over the charge with you.

19 You are charged in Count Sixteen with violating 21,
20 U.S.C., Section 841(a)(1) which states, in pertinent part,
21 it shall be unlawful for any person knowingly or
22 intentionally to distribute a controlled substance; in this
23 case, marijuana.

24 If the Government had to go to trial in this case, Mr.
25 Anderson, it would have to prove the following elements

1 against you beyond a reasonable doubt:

2 First, that you knowingly and intentionally distributed
3 marijuana; and at the time you distributed it, you knew that
4 the substance was, in fact, a controlled substance.

5 I will further state to you that by law marijuana is a
6 controlled substance, and that the term "to distribute" as
7 used in that statutory language that I just gave to you
8 means to deliver or transfer possession or control of
9 something from one person to another.

10 I will further advise you that by law, to distribute
11 includes the sale of something by one person to another.

12 An act is done knowingly if it is done voluntarily and
13 intentionally and not because of mistake or accident or some
14 other innocent reason.

15 An act is done intentionally as used in these
16 definitions and statutory language if it's done knowing that
17 the act is one that the law forbids and purposefully
18 intending to violate the law.

19 Now that I have gone over the statutory language with
20 you and those definitions, do you consider yourself to be
21 guilty of violating 21, U.S.C., Section 841(a)(1)?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Tell me in your own words what it is
24 you did, Mr. Anderson, that makes you guilty of violating
25 that provision.

1 THE DEFENDANT: On or around the time of
2 January 27th I did distribute five pounds of marijuana to
3 the person that they said I did.

4 THE COURT: All right. Let me back you up. You
5 say January 27th, on or around that date, --

6 THE DEFENDANT: Yeah.

7 THE COURT: -- you distributed -- did I understand
8 you to say five pounds of marijuana?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: To whom?

11 THE DEFENDANT: To Phillip Thompson.

12 THE COURT: And where did this take place?

13 THE DEFENDANT: At Phillip Thompson's house.

14 THE COURT: And where is that?

15 THE DEFENDANT: It's in Beckley on -- I don't know
16 the exact name of the street. I just know where it is.

17 THE COURT: All right. And I take it when you
18 distributed the five pounds of marijuana to him you knew it
19 was, in fact, a controlled substance and that you were
20 breaking the law?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: What did you receive in exchange for
23 that?

24 THE DEFENDANT: I was to pick up money at a later
25 date.

1 THE COURT: How much money?

2 THE DEFENDANT: I would charge fifteen to sixteen
3 hundred a pound.

4 THE COURT: All right. How had this been
5 arranged, Mr. Anderson?

6 THE DEFENDANT: I talked to him one day maybe a
7 couple months prior and we just started from there.

8 THE COURT: And --

9 THE DEFENDANT: He said he needed it. I
10 basically --

11 THE COURT: And on the date that you went to his
12 home and distributed the five pounds of marijuana, was he
13 expecting you? Had there been arrangements made for that
14 deal at that particular time?

15 THE DEFENDANT: I would just show up, no calls, no
16 nothing, just show up and do it like that.

17 THE COURT: All right. And how much later was it
18 that you were supposed to receive the money for the
19 marijuana that you distributed on that date?

20 THE DEFENDANT: I would do it the same way. I
21 would just stop by periodically, and whatever he had at that
22 time I would collect.

23 THE COURT: All right. And you say that this
24 happened at his residence in Beckley here within the
25 Southern District of West Virginia? Is that correct?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: You-all can have a seat there
3 momentarily.

4 Mr. Bushong, if you would, please, make a proffer as to
5 what the Government's evidence would be if the matter
6 proceeded to trial.

7 MR. BUSHONG: Your Honor, if this case were to go
8 to trial, the United States would present evidence that on
9 or about January 27th, 2011, the defendant, near Beckley,
10 West Virginia, in the Southern District of West Virginia,
11 distributed approximately five pounds of marijuana to a
12 person known to the grand jury and to the defendant. That
13 person has been named in court. The defendant is right. It
14 was Phillip Thompson.

15 That money was -- or that marijuana was given by the
16 defendant to Phillip Thompson on the front. It was an
17 agreed upon price between the two. And the defendant is
18 right that the collection of that agreed amount would occur
19 from time to time.

20 There was a search warrant executed by police officers
21 at Phillip Thompson's house on January 27th, 2011. There
22 was a quantity of marijuana seized.

23 If this case were to go to trial, the United States
24 would call as witnesses, at a minimum, Phillip Thompson, the
25 case agent, the chemist who tested the marijuana that was

1 seized from Phillip Thompson's house.

2 As exhibits we would enter the -- we would offer the
3 seized marijuana from Phillip Thompson's house. We would
4 also introduce 404(b) evidence as it relates to Count
5 Sixteen, but substantive evidence -- the same evidence being
6 substantive evidence as it relates to Count One,
7 particularly exhibits that were seized on January 21st,
8 about a week prior to this date, 2011.

9 The United States would ask the Court to take judicial
10 notice that marijuana is a Schedule I controlled substance,
11 and that Beckley, West Virginia, is within the Southern
12 District of West Virginia.

13 THE COURT: All right. Thank you.

14 Mr. Anderson, is what Mr. Bushong just stated
15 substantially correct?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And, Mr. Mills, are you satisfied if
18 the matter proceeded to trial that there would be no
19 meritorious legal defense to this claim?

20 MR. MILLS: Your Honor, I believe that, that the
21 facts that the, the defendant has admitted to and the
22 Government has summarized would, would be sufficient to
23 convince the jury beyond a reasonable doubt.

24 THE COURT: And are you satisfied that there is no
25 meritorious legal defense to the claim?

1 MR. MILLS: Yes, Your Honor.

2 THE COURT: Are you also satisfied that
3 Mr. Anderson's constitutional and other legal rights have
4 been fully observed?

5 MR. MILLS: Yes, Your Honor. We've explored all
6 the search and seizure issues, the statement issues,
7 extensively explored the grand jury testimony, his rights
8 regarding witnesses that may testify against him, and I
9 believe all of his constitutional rights have been
10 vindicated to this point.

11 THE COURT: Do you concur, Mr. Mills, in your
12 client's now stated intention to plead guilty?

13 MR. MILLS: Yes, I do, Your Honor.

14 THE COURT: Mr. Anderson, I find that there is a
15 sufficient factual basis to support your plea of guilty.

16 Do you understand that you are pleading guilty to a
17 felony offense and that if I accept your plea, you will be
18 adjudged guilty of a felony?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Do you also understand that such a
21 judgment can deprive you of valuable civil rights such as
22 your right to vote, your right to hold public office, your
23 right to sit as a juror, and your right to possess a
24 firearm?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Do you also understand that if you
2 plead guilty and I accept your plea that you expose yourself
3 to a maximum period of incarceration of five years?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Do you further understand, Mr.
6 Anderson, that the Court could fine you up to \$250,000, or
7 twice the gross pecuniary gain or loss resulting from your
8 conduct, whichever is greater?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Additionally, do you understand that
11 you would be subject to a period of supervised release of up
12 to three years?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you understand, Mr. Anderson, that
15 supervised release means after release from prison you would
16 be supervised by the probation office under terms and
17 conditions set by the Court?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Do you also understand, importantly,
20 that if you violated any of those terms and conditions of
21 supervised release, the Court could revoke your period of
22 supervised release and require you to spend the entire
23 supervised release period in prison?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Further, do you understand that you

1 will be assessed a special assessment of \$100 for having
2 been convicted of a felony offense?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And, additionally, do you understand
5 that the Court could deny you certain federal benefits for a
6 period up to five years --

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: -- and require you to make restitution
9 to any identifiable crime victims if there are any?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: Have you discussed with Mr. Mills the
12 application of the United States Sentencing Guidelines to
13 your case?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: I'll talk to you about that briefly
16 here this morning.

17 Do you understand that I will not be able to determine
18 the applicable advisory guideline range in your case until
19 after the probation department prepares a pre-sentence
20 report and until after both you and the Government have had
21 the opportunity to challenge the facts contained in that
22 report?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Counsel, based on my review of the
25 Pre-Trial Services Report, it would indicate that this

1 defendant has one prior felony conviction and would,
2 therefore, not be someone to whom the career offender
3 enhancement would apply. Do you lawyers agree that that is
4 the case?

5 MR. MILLS: That is correct. My understanding,
6 Your Honor, through my research and my investigation, I have
7 advised the defendant that the career offender would not
8 apply.

9 MR. BUSHONG: I, I don't know, Your Honor.

10 THE COURT: All right. Let me do this. And for
11 you lawyers who are here on a regular basis, this will be my
12 pattern of going forward.

13 My review of the Pre-Trial Services Report indicates
14 that you have one prior felony conviction for a drug
15 offense. If that is the only one, you will not be subject
16 to career offender treatment under the Sentencing
17 Guidelines.

18 However, because that information in the Pre-Trial
19 Services Report is often preliminary, I'm going to advise
20 you of it before you enter your plea so that you know all
21 information relative to making up your mind about deciding
22 on a plea of guilty.

23 Do you understand that?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Mr. Anderson, did you discuss with

1 Mr. Mills the career offender provision as that term is
2 defined and used in the United States Sentencing Guidelines?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And has he advised you that if you
5 have certain felony convictions, that being two felony
6 convictions, two of which are drug offenses or a combination
7 of a drug offense and a violent offense, that with the
8 conviction that you will gain if this plea is accepted that
9 you would qualify for career offender enhancement under
10 Section 4B1.1 of the United States Sentencing Guidelines?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: And do you understand that although
13 the Government has agreed not to file an information under
14 21, U.S.C., Section 851 which would allow for increased
15 statutory penalties, that that agreement does not in any way
16 affect whether career offender enhancement would be applied
17 to your case under the Sentencing Guidelines?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Does that make sense to you?

20 THE DEFENDANT: Yes.

21 THE COURT: All right. Do you understand that the
22 sentence that I impose may be different from any estimate
23 that Mr. Mills may have given to you?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Do you also understand, Mr. Anderson,

1 that I am required to calculate that advisory guideline
2 range that I talked to you about briefly, consider that
3 range, consider departures under the United States
4 Sentencing Guidelines, and also consider the sentencing
5 factors which are set forth in 18, U.S.C., Section 3553(a)
6 in determining your appropriate sentence?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Do you also understand that I'm not
9 bound by that guideline range and that I could impose a
10 sentence that's either less severe or more severe than that
11 called for by the guideline range?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Do you further understand that parole
14 has been abolished and that if you are sentenced to a term
15 of imprisonment, Mr. Anderson, you will not be released on
16 parole?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And do you understand that even if you
19 do not like my sentence, you still would be bound by your
20 plea of guilty and would not be permitted to withdraw it?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you understand that you have a
23 right to testify at your sentencing hearing if you choose?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Do you also understand that you may

1 have a right to appeal your conviction if you believe that
2 your guilty plea was unlawful or involuntary or that there
3 was some other fundamental defect in the proceeding that was
4 not waived either by your plea of guilty or by your plea
5 agreement?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Do you understand that you or the
8 Government may have a right to appeal any sentence that I
9 impose?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: But, importantly, do you understand
12 that you have agreed to give up your right to appeal your
13 sentence or the manner in which the Court determined your
14 sentence even if you believe that I've miscalculated the
15 applicable advisory guideline range?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And do you understand that you have
18 agreed to give up your right to appeal the term of
19 imprisonment or fine on any ground whatsoever unless that
20 sentence or fine exceeds the statutory maximum?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Again, does that make sense to you,
23 Mr. Anderson?

24 THE DEFENDANT: Yes, it does.

25 THE COURT: Do you further understand that you

1 waive your right to challenge your guilty plea, conviction,
2 and sentence by collateral attack, including a motion
3 brought pursuant to 28, U.S.C., Section 2255 unless that
4 collateral attack is based on a claim of ineffective
5 assistance of counsel?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: And do you further understand that
8 you've waived all rights to request or receive from any
9 department or agency of the United States any records
10 pertaining to the investigation or prosecution of your case
11 under the Freedom of Information Act or the Privacy Act of
12 1974?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Have you discussed the waiver of these
15 appellate rights with your attorney, Mr. Mills?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And having done so, Mr. Anderson, is
18 it still your desire to waive those rights?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Do you understand that with very few
21 exceptions any notice of appeal must be in writing and filed
22 within 14 days of judgment being entered in your case?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Any questions about anything I've said
25 to you thus far?

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: I find that you understand the nature
3 of the charge and the consequences of pleading guilty.

4 Do you understand that although you came here today
5 with the intention of pleading guilty, you have the right to
6 plead not guilty?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Do you also understand that by
9 pleading guilty you're giving up your right to a public and
10 speedy trial by jury?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: And do you understand when you plead
13 guilty, you give up your right to force the Government to
14 come forward with evidence or witnesses against you?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Mr. Anderson, do you understand that
17 had you desired to go to trial, you would have been presumed
18 innocent until or unless the Government came forward with
19 sufficient evidence to convince both the Judge and the jury
20 of your guilt beyond a reasonable doubt?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: And do you further understand when you
23 admit your guilt as you are doing here this morning, you
24 essentially relieve the Government of its burden of having
25 to prove your guilt beyond a reasonable doubt?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Do you understand that you would have
3 had the right to the assistance of your attorney, Mr. Mills,
4 at your trial?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: And do you understand that you and he
7 would have had the right and opportunity to confront and
8 cross-examine your accusers or to cross-examine each and
9 every witness presented by the Government and tested the
10 truth of what those witnesses stated during your trial?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: And do you understand that by pleading
13 guilty, you're giving up that right, Mr. Anderson?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Do you understand that had you desired
16 to go to trial and wanted to call witnesses, you would have
17 been entitled to the services of the United States Marshal
18 to bring witnesses to trial under subpoena?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: And by pleading guilty, of course, you
21 give up your right to call any and all witnesses except
22 during your sentencing hearing. Do you understand that
23 also?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Do you understand, Mr. Anderson, that

1 you would have had the right to move to suppress or keep
2 away from the jury's hearing and consideration any evidence
3 of any nature that had been illegally or unlawfully
4 obtained?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Do you further understand that had you
7 desired to go to trial that you would have had the right to
8 testify on your own behalf?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Importantly, do you understand that no
11 one could have forced or compelled you to testify?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Had you desired to testify, do you
14 understand that I would have instructed the jury that they
15 had to give the same careful consideration to your testimony
16 that they gave to the testimony of all of the other
17 witnesses in the case?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Do you also understand that,
20 alternatively, you would have had the right not to
21 testify -- or the right to remain silent, not to testify,
22 and not to present any witnesses if that was your choice?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Had you desired to remain silent,
25 Mr. Anderson, I would have instructed the jury that you had

1 a constitutional right to remain silent and that the jury
2 could not convict you because you chose to exercise that
3 right, but convict you only upon sufficient evidence
4 submitted by the Government to convince them of your guilt
5 beyond a reasonable doubt. Do you understand that?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Any questions about any of those
8 rights?

9 THE DEFENDANT: No, Your Honor.

10 THE COURT: I find that you understand the
11 constitutional and other legal rights you're giving up by
12 pleading guilty.

13 Knowing everything that I've said to you thus far, is
14 it still your desire to plead guilty?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Mr. Anderson, has anyone tried to
17 force, coerce, intimidate, put pressure on you, or talk you
18 into pleading guilty against your will?

19 THE DEFENDANT: No, Your Honor.

20 THE COURT: Other than this plea agreement, has
21 anyone made you any promises or told you anything different
22 than what I've said to you this morning to induce you to
23 plead guilty?

24 THE DEFENDANT: No, Your Honor.

25 THE COURT: Are you pleading freely and

1 voluntarily and of your own free will?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Is pleading guilty your own idea?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Have you understood everything that's
6 gone on in the proceedings here this morning?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: I find, Mr. Anderson, that your plea
9 is voluntary.

10 Are you having any second thoughts, any hesitation, or
11 questions about pleading guilty?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: If not, I'll ask you to sign the
14 written plea at this time.

15 Mr. Mills, I would ask that you endorse it as well.

16 (Pause)

17 THE COURT: Thank you.

18 The record should reflect that the defendant has signed
19 the written plea of guilty. It has been signed by his
20 attorney as well and it has been tendered to the clerk for
21 filing.

22 In the case of *United States vs. Shawn Anderson*, I
23 find, Mr. Anderson, that you are fully competent and capable
24 of entering an informed plea.

25 I further find that there is a sufficient factual basis

1 to support your plea of guilty and that you understand the
2 nature of the charge and the consequences of pleading
3 guilty.

4 I find that you understand the constitutional and other
5 legal rights that you are going to be waiving and giving up
6 by pleading guilty. And I find that your plea is voluntary.

7 Although I have deferred acceptance of the plea
8 agreement until I have the opportunity to review your
9 pre-sentence report, I do, in fact, accept your plea of
10 guilty. I adjudge that you are guilty. You now stand
11 convicted of violating 21, U.S.C., Section 841(a)(1).

12 I'll direct the probation office to conduct a
13 pre-sentence investigation of Mr. Anderson, prepare a draft
14 report and disclose its contents to the Government and to
15 the defendant no later than August the 17th.

16 I'll further direct, counsel, that you make any
17 objections to that draft report no later than August 31st.

18 The final pre-sentence report, then, will be due to the
19 Court no later than September 16th. And both parties should
20 file your sentencing memoranda no later than October 19th.

21 I'll schedule the matter for sentencing on October 26th
22 at 10:00 a.m.

23 Are there any issues, counsel, with respect to relevant
24 conduct?

25 MR. BUSHONG: I don't believe there will be, Your

1 Honor. But if any arise, the United States and Mr. Mills
2 will operate under your, your standing order.

3 THE COURT: Mr. Mills, are you satisfied to
4 proceed in that manner?

5 MR. MILLS: Your Honor, I didn't hear the Court's
6 question. I'm sorry.

7 THE COURT: I asked whether or not there were
8 anticipated any issues with respect to relevant conduct.

9 MR. MILLS: Without seeing the pre-sentence
10 report, Your Honor, I can't say. But I, I wouldn't want to
11 bind myself one way or the other at this point on
12 Mr. Anderson's behalf, but I certainly agree with
13 Mr. Bushong. And I'll review the Court's standing order - I
14 haven't seen it - to be clear with the Court.

15 THE COURT: All right.

16 Mr. Bushong, I will expect counsel to work together on
17 that issue and if there are any problems, you'll get the
18 Court a chart and we'll proceed from there.

19 MR. BUSHONG: Yes, Your Honor.

20 THE COURT: Mr. Anderson, the Bail Reform Act
21 requires that you, now having been convicted, be detained
22 awaiting sentence unless the Court finds by clear and
23 convincing evidence that you're not likely to flee and not
24 likely to pose a danger to any other person or to the
25 community if released.

1 Counsel, I have received a Pre-Trial Services Report as
2 well as a Release Status Report that contains information
3 relative to the issue of his detention or release. Are
4 there any objections to my using those documents as evidence
5 in this case?

6 MR. BUSHONG: No, Your Honor.

7 MR. MILLS: No, there is not, Your Honor. I've
8 had an opportunity to review them. Ms. King provided them
9 to me this morning.

10 THE COURT: All right.

11 MR. MILLS: I can also advise the Court of the
12 defendant's continuing efforts and employment, where he's
13 employed, two jobs.

14 THE COURT: I'll call on you and give you an
15 opportunity to do that, counsel.

16 MR. MILLS: Thank you.

17 THE COURT: I will note from my review of those
18 documents -- you can have a seat -- that the defendant has
19 lived here in the Southern District since 1996. He has a
20 prior record of drug offenses.

21 I will also note that based on my recollection of my
22 review of the pre-sentence report, he had made a statement
23 that he had gained employment with McDonald's.

24 And I will ask the probation office -- because at the
25 time I reviewed that information, it had not been

1 verified -- has it since been verified?

2 PROBATION OFFICER KING: Your Honor, I'm sorry, I
3 can't answer that question. Mr. Gibson, Officer Gibson in
4 Charleston has been supervising the defendant. I could find
5 out and advise the Court later.

6 THE COURT: All right. Thank you. I'd appreciate
7 it.

8 PROBATION OFFICER KING: Yes, Your Honor.

9 THE COURT: Mr. Bushong, any position the
10 Government wants to take relative to detention or release?

11 MR. BUSHONG: Your Honor, the United States is in
12 favor of continued bond. It's my understanding, and I'll
13 stand corrected, but it's my understanding the defendant has
14 employment and may have an opportunity to even better his
15 opportunities as far as employment goes. The United States
16 is unaware of any problems while on bond, and I would see no
17 reason why the defendant could not remain on bond.

18 THE COURT: I will note for the record that the
19 Release Status Report that is dated May 26th, fairly recent,
20 indicates that the defendant has complied with all terms and
21 conditions of his pre-trial release.

22 Mr. Mills, anything that you want to place on the
23 record with respect to release and/or detention?

24 MR. MILLS: Your Honor, we would ask for continued
25 release. As the Court has noted, the mandatory detention

1 act does not apply, but the Court has the, the decision to
2 make about whether this defendant has earned the right to
3 continue to stay out now that his guilty plea has been
4 tendered. We would suggest respectfully to the Court that
5 he, that he be allowed to remain out.

6 I can answer the Court's question regarding his
7 employment verification. Mr. Gibson, the probation officer
8 from Charleston, has been to his employment at McDonald's
9 and verified it there. He's been -- Mr., Mr. Anderson has
10 been employed since the day of his arraignment. Actually, a
11 couple days before when he was released -- he was initially
12 arrested, released, returned for his arraignment voluntarily
13 and had obtained employment at McDonald's at that time.

14 He has since obtained a second job working at
15 Delightfully Yours as a salad prep chef. So, he works two
16 jobs. I don't know that Mr. Gibson has visited the second
17 job yet. But in the -- during those two jobs, he is working
18 seven days a week.

19 He's also enrolled to return to the mining industry and
20 he's enrolled in classes for certification for mine
21 certification. He was previously certified. He's made
22 inquiry in the field and has been told by the people that
23 he's been contacting that once he receives his certificate,
24 his mine surface certificate, he will be eligible for
25 employment and likely to become employed in that gainful

1 occupation, not just a job.

2 He -- while he's working these two jobs, he has gone to
3 class in the mornings to obtain his certification back in
4 the mine and get his feet back on the right course. So, his
5 certification is due to, to be final this coming Friday,
6 Friday after -- I'm sorry, Your Honor -- Friday or Monday
7 after this week.

8 And, so, we would ask for the reasons that, that we've
9 laid on the record and the other ones that the Court has
10 made findings about and the probation officer's
11 recommendation because of his compliance with all of his
12 conditions that he be allowed to remain on bond.

13 He also lives with his aunt who is elderly and in need
14 of his assistance. He provides medications and transports
15 her from time to time, when given permission, to and from
16 medical visits. She's recovering and is doing better and is
17 somewhat able to be on her own, but he assists with her
18 care.

19 He also has a young son who he has participated in
20 raising that lives in Beckley and attends, when given
21 permission from the probation officer, athletic events. He
22 was a wrestling coach for a number of years.

23 So, Mr. Anderson has, has tried to step back into the
24 productive way of living and be a member of this community
25 that the community can be proud of. We'd ask that the Court

1 give him the opportunity during this time between his plea
2 and sentence to continue with that course.

3 THE COURT: Thank you.

4 Having listened to the statements of counsel and having
5 given consideration to the information contained in the
6 Pre-Trial Services Report and the Release Status Report as
7 evidence, I find by clear and convincing evidence, Mr.
8 Anderson, that you're not likely to flee and not likely to
9 pose a danger to any other person or to the community. And,
10 therefore, I am going to order that you continue your
11 release on the bond that you previously executed.

12 Before we leave, I want to advise you that if you
13 knowingly fail to appear before this Court as required now
14 as a condition of your bond on October 26th, 2011, then in
15 addition to any sentence that I impose upon you for your
16 conviction here today, I may impose an additional sentence
17 on you of up to five years.

18 Further, if you commit any offense whatsoever while you
19 are released on bond pending sentence, then in addition to
20 the sentence that I impose as a result of your conviction
21 today, I will be required to impose an additional sentence.

22 If the offense that you commit is a felony offense, I
23 can impose a sentence up to 10 years. If the offense you
24 commit is a misdemeanor, I can impose a, a sentence of up to
25 one year.

1 In either event, that sentence would run consecutively
2 to, not concurrently with, the sentence I impose as a result
3 of today's conviction.

4 Does that make sense to you?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: All right.

7 Any other matters that we need to address here today,
8 counsel?

9 MR. BUSHONG: No, Your Honor.

10 MR. MILLS: Your Honor, the Court, having granted
11 the motion to, to, for release, Mr. Anderson appreciates the
12 Court's confidence. He was given a home confinement
13 bracelet at the time of his release by the magistrate. If
14 the Court would like to have him continue with that, he's
15 happy to do that.

16 And I'm only asking the Court to inquire whether or not
17 if the Court believes it's necessary to ensure his, his
18 reporting because of his three different employment
19 opportunities and his travel for his child. He has a number
20 of different community activities he calls and asks
21 permission for, but it's not always easy to get ahold of
22 the, of the probation officer because of the probation
23 officer's duties.

24 So, sometimes with job changes, schedule changes, it
25 gets a little complicated. He has shown, I think, a very

1 strong reliability in appearing for court and has complied
2 with all of the probation officer's requests and always been
3 where he said he was going to be.

4 THE COURT: In finding that he is not likely to
5 flee and not likely to pose a danger to any person or to the
6 community, it was my intention to release him on the bond
7 previously executed under the same terms and conditions.

8 Anything further?

9 MR. MILLS: No, Your Honor. Thank you.

10 THE COURT: You-all have a good day.

11 (Proceedings concluded at 10:50 a.m.)
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1 I, Lisa A. Cook, Official Reporter of the United
2 States District Court for the Southern District of West
3 Virginia, do hereby certify that the foregoing is a true and
4 correct transcript, to the best of my ability, from the
5 record of proceedings in the above-entitled matter.

6
7
8 s\Lisa A. Cook

June 30, 2011

9 Reporter

Date

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